

SUE W. KELLY
19TH DISTRICT, NEW YORK

COMMITTEE ON FINANCIAL SERVICES, VICE CHAIR
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Congress of the United States
House of Representatives
Washington, DC 20515-3219

August 12, 2005

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Secretary Vernon A. Williams
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

FD-34734

Dear Secretary Williams,

Recently, I was contacted by constituents from Croton-on-Hudson, New York, who register serious reservations to Northeast Interchange Railway (NIR) recent request of a Notice of Exempt Transaction to the Surface Transportation Board. I am writing to inform you that I agree with their concerns of the detrimental impact of granting it's application to NIR and therefore urge you to oppose such ratification.

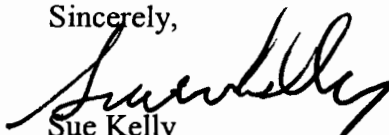
Northeast Interchange Railway is currently a noncarrier, but as their recent application stipulates, they intend on becoming a common carrier by rail. This would enable them to provide transportation service for the transloading of construction and demolition waste and other materials.

The Mayor of Croton-on-Hudson, Village Trustees, and residents in Croton urged me to contact the Surface Transportation Board voicing their serious opposition to NIR's application because of the undeniable hazardous ramifications it poses to the environment and the health of the community.

Simply, my constituents and I are concerned that if STB ratifies the NIR application, local and state environmental regulations may be compromised, thus endangering the health and safety of residents of the Croton-on-Hudson. Moreover, granting NIR's application would set a dangerous precedent that undoubtedly will jeopardize the safety and well-being of not only constituents in my district but throughout the United States.

I would like to thank you in advance for your prompt consideration of this matter.

Sincerely,


Sue Kelly
Member of Congress

CHARLES E. SCHUMER
NEW YORK

United States Senate

WASHINGTON, DC 20510

COMMITTEES:
BANKING
ENERGY
JUDICIARY
RULES

August 12, 2005
The Honorable Roger Nober
Chairman, Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423
Fax: 202-565-9016 Phone: 202-565-1592

Re: Northeast Interchange Railway

Dear Chairman Nober:

The Surface Transportation Board has before it an application by the Northeast Interchange Railway (NIR) for an entirely inappropriate use of the preemption provisions of the Interstate Commerce Commission Termination Act. I urge you to reject this application.

An affiliate of NIR, Regus Industries, is seeking to buy a company that owns several solid waste facilities in Westchester County, New York. One of these, the Metro Enviro transfer station in the Village of Croton-on-Hudson, has accumulated such a long series of violations that the New York Court of Appeals just last month upheld the Village's order that it shut down. This followed a multi-year investigation by a federal court-appointed monitor who discovered many violations at this facility, including accepting industrial waste and falsifying tonnage records.

In an effort to stay open, however, the facility's owners are trying to sell to a company affiliated with a railroad. The rationale is that the 1,600-foot-long rail spur between the facility and the Metro North tracks somehow makes the whole operation a railroad that is exempt from state and local environmental controls. The local municipality, the Village of Croton-on-Hudson, is concerned about losing its ability to oversee and control the kinds and quantities of materials transported over the rail spur, and the way they are handled while on the site. Under the current owner, the Village has permitting authority over the facility, enabling it to impose and enforce reasonable environmental controls.

The STB should see through this transparent attempt to shield an environmentally problematic operation from environmental oversight. The STB has many important functions, but they do not include taking over the functions of state and local environmental and zoning agencies. If the STB grants this application, there will be no end to the industrial facilities that happen to be on rail spurs and that will attempt to use the same technique to avoid environmental regulation.

Sincerely,

Charles E. Schumer
Charles E. Schumer
United States Senator

PLEASE RESPOND TO THE FOLLOWING OFFICE:

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<http://schumer.senate.gov>



WESTCHESTER COUNTY BOARD OF LEGISLATORS

800 MICHAELIAN OFFICE BUILDING
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2005 AUG 16 A 10 35

OFFICE OF CHAIRMAN
NOBER

THOMAS J. ABINANTI
Legislator, 12th District

August 12, 2005

Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20423-001

Chairman
Committee on the Environment
Special Committee on
Solid Waste & Recyclables
Member
Committee on Budget & Appropriations
Committee on Legislation
Committee on Health

Re: Finance Docket No. 34734
Northeast Interchange Railway, LLC, Lease and Operation Exemption
Line in Croton-on-Hudson, New York

Dear Chairman Nober and Members of the Board:

As a Westchester County Legislator and the Chair of the Committee on Solid Waste and Recyclables, I urge the Surface Transportation Board to reject the attempt of Northeast Interchange Railway, LLC ("NIR"), actually a construction and demolition debris processor, to disguise itself as a railroad to exempt itself from state and local regulations. The County appreciates that the STB has stayed NIR's notice of exemption and is permitting input from interested parties.

Westchester County has a unique interest in regulating waste haulers. In 1999, after several years of investigation and research, the County enacted the Westchester County Solid Waste and Recyclables Collection Licensing Law for two purposes. The first, because of our own concerns and pursuant to state mandate, was to ensure that solid waste generated within the County is disposed of or recycled in an environmentally safe and sound manner.

The second – and perhaps overarching – was to address the threat and influence of organized crime in the solid waste and recycling operations in Westchester County. Following federal indictments of garbage industry executives, the Board of Legislators commenced an in-depth study and found that organized crime permeated the solid waste hauling industry in Westchester County and constituted a significant problem for the health, safety and welfare of County residents. The existence of cartels has produced crime and corruption, as well as anti-competitive effects in the industry, including price fixing, prevention of new entry into the industry, and unconscionable customer contract terms. Through the modification of standards for waste hauling licenses and the

expansion of the license application process in the Solid Waste Collection Licensing Law, the County is trying to ensure the good character, honesty and integrity of waste haulers in the County; to encourage competition; to regulate and monitor customer contracts; and to eliminate the influence of organized crime in the solid waste and recyclables collection industry.

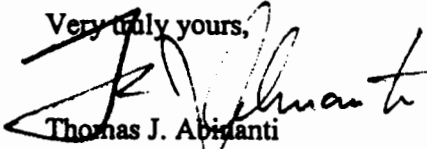
Although we believe that any waste hauling operation -- even one disguised as a railroad -- is subject our licensing law, we have some concern that NIR -- with its 1600 foot track spur -- would claim itself exempt. As the STB itself stated in its August 5, 2005 decision staying NIR's notice of exemption, "The transaction proposed by NIR would . . . trigger[] the agency's primary jurisdiction and rais[e] important issues regarding the potential preemption of the proposed service from many aspects of local control."

Our opposition to NIR's application does not arise from NIMBY-ism. Nor is its opposition merely based on environmental concerns, albeit we share those very important concerns with the Village of Croton-on-Hudson and the State of New York. Nor do we seek to interfere with railroad operations. Rather, the County has a very specific and critically important interest in eliminating the influence of organized crime in the waste hauling business in Westchester County. I have read NIR's Notice of Exempt Transaction and am familiar both with the entities mentioned in it and with Metro Enviro, whose assets NIR intends to purchase. I must advise the STB that the site has had a checkered history with many concerns having been raised about the good character, honesty and integrity of some of those who have been involved in its operation in the past. Similar concerns have been raised about some of those who may potentially want to be involved in its operation and it is respectfully suggested that they may not qualify for a Westchester County Solid Waste and Recyclables Collection License.

As stated in the enclosed resolution, the Westchester County Committee on Solid Waste and Recyclables urges the STB not to permit NIR, an admitted processor of construction and demolition waste, to attempt an end run around our law. We urge that the STB reject NIR's notice of exemption. This decision impacts not only the Village of Croton-on-Hudson; it will set a precedent for the entire County. If NIR is deemed exempt, every waste hauler with a few feet of track and every hauler located near a railroad track -- indeed, every waste hauler who can make a deal with a company located on a railroad track-- will seek a similar exemption and thereby thwart all environmental, land use and anti-corruption regulations of the waste hauling industry.

Thank you for your attention to this very important matter. Please advise me of any further proceedings related to this application.

Very truly yours,



Thomas J. Abidanti

Chair, Committee on Solid Waste and Recyclables

*Passed by Committee
Aug. 12, 2005*

COMMITTEE ON SOLID WASTE AND RECYCLABLES

WHEREAS the Westchester County Board of Legislators has found that organized crime permeates the solid waste hauling industry in Westchester County and constitutes a significant problem and matter of public concern within the County; and

WHEREAS the Board of Legislators, in order to address that problem, enacted the Westchester County Solid Waste and Recyclables Collection Licensing Law ("Solid Waste Collection Licensing Law"); and

WHEREAS the purposes of the Solid Waste Collection Licensing Law are: (a) to ensure that solid waste generated within the County is disposed of or recycled in an environmentally safe and sound manner, and (b) to address the influence and the threat of the influence of organized crime in the solid waste and recycling industries operating in Westchester County; and

WHEREAS the Committee on Solid Waste and Recyclables has learned that Northeast Interchange Railway, LLC ("NIR") has contracted to acquire the assets of Metro Enviro, a construction and demolition waste processor, which is currently located near the railway tracks in Croton-on-Hudson; and

WHEREAS the Village Of Croton-on-Hudson refused to renew Metro Enviro's special use permit to operate in the Village because of a long record of significant permit violations; and

WHEREAS NIR has filed a Notice of Exemption with the Surface Transportation Board ("STB") and is thereby seeking to invoke the jurisdiction of the STB in order to preempt state, county and municipal regulation; and

WHEREAS if NIR is permitted the exemption, it may claim to be exempt from the Westchester County Solid Waste and Recyclables Collection Licensing Law;

NOW THEREFORE BE IT RESOLVED that the Committee on Solid Waste and Recyclables urges the Surface Transportation Board to reject Northeast Interchange Railway's notice of exemption; and

BE IT FURTHER RESOLVED that the Committee on Solid Waste and Recyclables urges the Surface Transportation Board to reject any similar attempt by waste haulers to disguise as rail carriers in order to take advantage of the STB's jurisdiction to evade state, county and local environmental, land use laws and anti-corruption laws, regulations and permitting.

Report of Sub-Committee on Trash Haulers Westchester County Board of Legislators



March 1999

Thomas J. Abinanti, Chair

George Oros, Legislator

William Ryan, Legislator

John Carney

John Dinin

Polly Kuhn

Sub-Committee Staff:

Mary Anne Harkins

Thomas French

The Westchester County Board of Legislators Sub-Committee on Trash Hauling, having conducted an investigation into the solid waste industry in Westchester County and having held hearings relating to the influence of organized crime and anti-competitive practices on the industry, hereby reports its findings and recommendations.



CASH

Customers Actively Seeking Haulers

**REPORT OF SUB-COMMITTEE ON TRASH HAULERS
WESTCHESTER COUNTY BOARD OF LEGISLATORS**

Thomas J. Abinanti, Chair

George Oros, Legislator

William Ryan, Legislator

John Carney

John Dinin

Polly Kuhn

Sub-Committee Staff:

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
I. INTRODUCTION	5
II. MANAGEMENT OF SOLID WASTE IN WESTCHESTER COUNTY..	
A. Public Sector.....	
1. <i>Croton landfill</i>	11
2. <i>The RESCO Plant</i>	12
3. <i>County Refuse Disposal District No.1</i>	14
4. <i>County-owned transfer stations</i>	15
5. <i>The "MRF"</i>	17
B. Private Sector.....	
1. <i>Privately-owned transfer stations</i>	20
2. <i>Communities outside of District No.1</i>	22
3. <i>Public, quasi-public and private collection services</i>	22
4. <i>The public bidding experience</i>	23
5. <i>Costs of commercial collection</i>	24

III. SOLID WASTE: A CONTROLLED INDUSTRY.....	
A. Corruption-a regional problem.....	
1. <i>The property rights system</i>	26
2. <i>The New York City Experience</i>	27
3. <i>Westchester's Carting Industry</i>	29
a. <i>The Hinchey Report-an Early Warning</i>	30
b. <i>The Martin Report-Another Warning</i>	31
c. <i>Indictments/Convictions</i>	32
d. <i>The Federal Investigation</i>	32
i. <i>Genovese/Gambino property rights</i>	34
ii. <i>Corruption – Transfer station contracts</i>	34
iii. <i>United States of America v. James Ida et al</i>	37
e. <i>The Consumer Experience</i>	38
f. <i>Justice Department Input</i>	42
g. <i>Legal Records/Law Suits</i>	42
i. <i>A-1 Compaction v. Surburban</i>	43
ii. <i>Competition in Westchester: BFI arrives</i>	47
iii. <i>Vertical arrangements and customer lock-ins</i>	47
iv. <i>Surburban v. BFI</i>	50
v. <i>Surburban v. A-1 Compaction</i>	51
B. New York City's Response - Local Law 42.....	56
IV. FINDINGS.....	59
V. RECOMMENDATIONS.....	61
ENDNOTES.....	66
CUSTOMER'S BILL OF RIGHTS.....	74

APPENDICES

- 1. Solid Waste Management Plan**
- 2. Solid Waste and Recyclables Collection Licensing Law (1992)**
- 3. The Martin Report**
- 4. New York City Local Law 42**
- 5. Municipal Surveys**
- 6. DEF Questions/Responses**
- 7. 1981 Westchester County Trash Hauling Contract & Amendments**
- 8. 1992 Westchester County Trash Hauling Contract & Amendments**
- 9. Hearing (December 3, 1997) Minutes & Exhibits**
- 10. Hearing (November 5, 1997) Minutes & Exhibits**
- 11. Hearing (November 12, 1997) Minutes & Exhibits**
- 12. Hearing (November 24, 1997) Minutes & Exhibits**
- 13. FIA Report**
- 14. Press Reports**
- 15. Synopsis of Proposed Law**
- 16. Solid Waste and Recyclables Collection Licensing Law (Proposed)**

EXECUTIVE SUMMARY

The Westchester County Board of Legislators Sub-Committee on Trash Haulers has conducted an investigation into the solid waste industry in Westchester County and held hearings relating to the influence of organized crime and anti-competitive practices on the industry. This Sub-Committee probe was prompted, in part, by the recent federal investigation and conviction of prominent participants in the solid waste business in Westchester County and the surrounding area.

The Sub-Committee has found that (1) **the carting industry has been corruptly influenced by organized crime** for more than four decades; (2) **organized crime's corrupting influence has fostered and sustained a controlled environment** in which carters do not compete for customers; (3) **the controlled environment has been effectuated through a "property rights system"** and enforced by cartel control of the industry; (4) **the controlled environment has led to higher prices being charged to the Westchester customer (a "mob tax") and customers have been compelled to enter into long-term contracts with onerous terms including "evergreen clauses;"** (5) **organized crime's corrupting influence has led to the commission of numerous crimes and wrongful acts, including physical**

violence, threats of violence and damage to property against both customers and competing carting firms; (6) the pervasive nature of the problem in the Westchester carting industry, and its anti-competitive consequences, continue; (7) law enforcement efforts must be supplemented by **regulatory initiatives** to curb illegal and anti-competitive practices; (8) it is **necessary** to establish new county-level governmental agency to **license and regulate** businesses involved in the carting industry to insure lawful conduct by carting industry businesses and to protect the public interest; (9) **vigorous competition** and new entrants to the market must be encouraged.

Based upon these findings, the Sub-Committee recommends a strategy to eliminate the influence of organized crime on the solid waste industry in Westchester, repeal the "mob tax", encourage competition, and provide a "Customer's Bill of Rights."

- **The Sub-Committee therefore recommends that the Westchester County Board of Legislators enact a county law which would establish a Solid Waste Commission; set new licensing requirements designed to enhance the County's ability to address organized crime's corrupting influence; enhance consumer protections by providing residential, commercial and municipal consumers with a "Customer's Bill of Rights;" encourage competition by various means, including the establishment of an internet registry for customers actively seeking haulers (CASH Registry) in the trash hauling industry with a view toward reducing consumer prices and improving the quality of service.**

Specifically, this new County law would:

1. establish a Westchester County Solid Waste Commission, to:

- a. license, register and monitor all solid waste businesses;
- b. set standards for customer service, set requirements for service contracts, and develop and implement consumer education programs;
- c. set fees for all licenses and registrations;
- d. investigate all matters within its jurisdiction.

2. enhance licensing requirements for businesses in the solid waste industry, by requiring:

- a. that all applicants for Class A, B, C, D and E licenses and solid waste brokers submit applications on forms to be determined by the Commission;
- b. that the Commission determine the good character, honesty and integrity of all applicants;
- c. standards for applications, denials, refusals, suspensions, revocations, non-renewals, or modifications of licenses;
- d. standards for conduct of licensees and registrants.

3. protect the consumer and encourage competition, by:

- a. requiring written service contracts;

- b. setting standards for terms and conditions of service contracts, including the prohibition of liquidated damages provisions, automatic renewal clauses (also known as "evergreen clauses"), and other anti-competitive contractual terms;
 - c. declaring all existing service contracts terminable at will by the customer on the implementation date of the legislation;
 - d. limiting the terms of all contracts to two years (except under a municipality waiver provision);
 - e. requiring that all contracts have attached to them a uniform notice entitled "Customer's Bill of Rights."
 - f. establishing an internet registry for customers actively seeking haulers (CASH Registry).
- **The Sub-Committee further recommends that the County Executive conduct a careful review of the current system by which County-owned transfer stations and related facilities are operated and managed, and report his findings to the Board of Legislators.**

At present, there is one contract for the operation of the transfer stations (including the Materials Recovery Facility) and the transportation of trash to the RESCO "garbage to energy" plant at Charles Point, with one vendor providing these vital services.

The Sub-Committee recommends that the County Executive study the feasibility of:

- 1. outsourcing the various components of the current contract to more than one vendor;
 - 2. bringing "in house," all or part of the operation and management of these services.
- **The Sub-Committee also recommends that the County Executive**

study the feasibility of allocating space to commercial trash haulers at County-owned transfer stations to further stimulate competition and encourage new entrants to the solid waste industry.

INTRODUCTION

In June of 1996, a federal grand jury in the Southern District of New York indicted Suburban Carting Corp. of Mamaroneck, New York and 21 of its principals and subsidiaries, as well as several members of the Genovese organized crime family, the most notable of whom was Mario Gigante, a “*caporegime*.”¹ The indictment charged racketeering, tax evasion, anti-trust violations, money laundering, and other offenses associated with the control of the solid waste industry by organized criminal enterprises active in the New York metropolitan area.² By early 1998, virtually all defendants had pled guilty and been sentenced.³

Among the allegations contained in the federal indictment was that organized crime controlled the carting industry *via* the “property rights system.” As a result, anti-competitive practices characterized and, indeed, dominated the industry in Westchester County and its environs, and established and permitted organized crime to maintain a monopolistic stranglehold on the industry, its providers, and its consumers.⁴

Moreover, the indictment disclosed that organized crime enforced its illegal control by physical violence, threats of violence, property damage to both customers and competing carting companies, a host of anti-competitive

practices and a "mob tax" which has meant exorbitant profits for organized crime at the expense of the consumer.

In the wake of the indictments, in December of 1997, the Westchester County Board of Legislators designated a Sub-Committee on Trash Haulers. This committee, composed of legislators and private citizens, conducted an inquiry and held public hearings into the nature and functioning of the carting industry and organized crime's control and influence.

In attempting to identify the impact of organized crime's monopolistic control over Westchester's carting industry, the Sub-Committee has considered the following factors:

1. how the carting industry functions under the property rights system;
2. those consumers, providers, and services most affected by anti-competitive practices;
3. a range of options including possible legislative initiatives to regulate participants in the industry and encourage new entrants to a marketplace historically controlled by organized crime.

The Committee further considered:

4. how solid waste is collected;
5. by whom it is collected;

6. ownership, operation and control of transfer stations;
7. who uses RESCO;
8. alternatives to RESCO;
9. municipal and commercial user options for solid waste pickup;
10. the terms of private and public contracts for services, including the public bidding experience;
11. current licensing laws in Westchester and in other jurisdictions such as New York City and the State of New Jersey;
12. the federal investigation and prosecution of carting industry participants;
13. the U.S. Justice Department's (Antitrust Division) efforts to identify and eliminate anti-competitive practices in the carting industry in markets outside the New York Metropolitan area.

The Sub-Committee undertook to learn as much as possible about the handling of solid waste in Westchester County. Representatives of the Sub-Committee spoke at length with: (1) knowledgeable members of the Federal Bureau of Investigation and the United States Attorney's Office, (2) local

officials and businessmen/women who have had to deal with the disposal of solid waste in Westchester, (3) attorneys, investigators, government employees and others who have come into contact with or studied the management of solid waste in Westchester (4) solid waste industry participants. The Sub-Committee also solicited responses to surveys directed to municipalities and trash haulers in Westchester County.

Representatives of the Sub-Committee combed through reams of records supplied by the FBI, U.S. Attorney, and the Westchester County Department of Environmental Facilities. Sub-Committee representatives searched through court files and other County records.

The Sub-Committee solicited information by publicly appealing for input and by establishing both a confidential hotline and an Internet Address.

Finally, the Sub-Committee held public hearings and heard the following witnesses on the dates listed:

December 5, 1997:

- Edward Ferguson, Chairman and Executive Director, NYC Trade Waste Commission
- Chad Vignola, Deputy Commissioner, NYC Trade Waste Commission
- Gregory Meehan, Deputy County Attorney, County of Westchester
- Mary Anne Harkins, Sub-Committee Staff

November 5, 1998:

- Thomas French, Sub-Committee Staff
- Special Agent Daniel Butchko, Federal Bureau of Investigation

November 12, 1998:

- Chad Vignola
- Scott Moritz, Investigative Consultant, PricewaterhouseCoopers
- Barbara Fischer, Environmental Consultant, Great Forest Inc.

November 24, 1998

- Thomas French
- John Carney, Sub-Committee Member
- Michelle Celarier, Resident, Village of Croton-on-Hudson

SUB-COMMITTEE MEMBERS:

- **Thomas J. Abinanti**, Chair (Attorney; Majority Leader-Westchester Legislature; Chair -Health Committee)
- **George Oros** (Attorney; Former Chair-Westchester Legislature; Chair -Community Affairs and Housing Committee)
- **William Ryan** (Chair-Public Safety & Criminal Justice Committee; former Assemblyman and member of the Hinchey Commission, which produced report referred to herein.)
- **John Carney** (Attorney; Former Supervisor-Town of Pelham)
- **Polly Kuhn** (Former Supervisor-Town of New Castle)
- **John Dinin** (Attorney; Supervisor and Former Justice, Town of Bedford; Former Westchester County Assistant District Attorney)

Chief Staff to Sub-Committee:

- **Mary Anne Harkins** (Attorney; Former Westchester County Assistant District Attorney)
- **Thomas French** (Investigative Consultant; Former FBI supervisory agent in charge of New Rochelle office and all federal organized crime investigations in Westchester County)

II. MANAGEMENT OF SOLID WASTE IN WESTCHESTER COUNTY

A. PUBLIC SECTOR

1. *Croton landfill*

In the 1970s, Westchester County was faced with the prospect of closing the Croton landfill where most solid waste, including recyclables and construction and demolition materials, had been discarded since the mid-1930s.⁵ The landfill was fast approaching capacity and the County needed an alternative site for trash disposal. Further impetus to find an alternative came from an action brought by the United States Attorney against the County alleging probable pollution of the Hudson River by leachate from the Croton landfill. These factors, together with the energy crisis of the late 1970s (an ostensible harbinger of increasing energy costs in the coming decades) made the construction of a resource recovery plant to manage solid waste an attractive alternative.⁶

2. *The Resco plant*

In the late 1970s, the County decided to initiate the construction of a "garbage to energy" plant at Charles Point in Peekskill (now known as the "Resco" facility).⁷ This facility is not owned by the County; it is owned by Westchester Resco Company, L.L.P., a subsidiary of Wheelabrator Technologies Inc.⁸ Financing was obtained through the Westchester County Industrial Development Agency ("WIDA"); the plant opened in 1984.⁹

In order to secure financing for this project, the County had to guarantee tonnage, and to that end invited all of its municipalities to sign Intermunicipal Agreements ("IMAs").¹⁰ These Agreements insured participating municipalities access to a disposal facility at a set rate; the County was insured of the tonnage it needed to secure financing. The allocation of this tonnage may be summarized as follows:¹¹

- i. Resco has an annual capacity of 657,000 tons;
- ii. The County has guaranteed access for disposal of 400,000 tons directed to Resco by the County or the WIDA to a maximum of 550,000 tons per year;

iii. The difference between the 550,000 tons guaranteed to the County and the maximum allowable tonnage of 657,000 is marketed by Resco to any other user whom Resco deems appropriate, whether under long or short term contracts or on the "spot market".¹² For tonnage between 400,000 and 550,000, the rate charged to "non-IMAs" is approximately \$54.00 per ton (1998 rate), an amount set by the Westchester County Board of Legislators.¹³ The County and Resco share the profits, if any, from the sale of this capacity. For tonnage between 550,000 and 657,000, the fee paid is market driven, but is generally in the range of \$42-\$70 per ton (fluctuation tends to be seasonal).¹⁴ Resco retains its revenue from the sale of its capacity over 550,000 tons.¹⁵

Thirty-six (36) of the County's forty-three (43) municipalities, with populations representing approximately 90% of the county's residents, agreed to execute "IMA" agreements.¹⁶ Six communities (the "Six Towns") decided not to participate. It is important to emphasize, however, that the Solid Waste Management Plan assures capacity for the disposal of *residential* waste generated by the IMA communities. The Plan does not guarantee disposal for the commercial waste stream, although, as noted above, some capacity at Resco is made available to the commercial sector.¹⁷

In 1990, commercial tonnage in Westchester County was approximately 345,700 tons.¹⁸ It has been projected to rise to approximately 367,900 by the year 2000.¹⁹

In 1997, IMA tonnage at Resco was approximately 457,000.²⁰ This tonnage has been steadily, albeit slowly, decreasing since the late 1980s, when the County expanded its recycling efforts by, *inter alia*, opening a Material Recovery Facility ("MRF") in Yonkers²¹. In 1997, the "non-IMA" tonnage directed to Resco by the County was approximately 39,139.²² Total tonnage sold by Resco directly on the "spot market" was approximately 155,000.²³

3. County Refuse Disposal District No. 1

In 1982, the New York State Comptroller approved the creation of County Refuse Disposal District No. 1 (a special assessment district), to finance the County's solid waste management, including the Resco facility at Charles Point in Peekskill.²⁴

There are several important consequences of membership in District No. 1 which may be summarized in the following general terms:

- i. the IMA communities have guaranteed access to county owned transfer stations and capacity at Resco;

ii. the IMA municipality must “guarantee” to provide a certain tonnage each year;

iii. disposal of all residential waste is guaranteed at a “set price” (the 1998 rate was under \$22.00 per ton), charged back to the municipality on a monthly basis;

iv. the difference between the “set price” and the actual cost of disposal is charged back to District No. 1 municipalities on an *ad valorem* basis;

v. the commercial waste stream is not included in this disposal plan, although, as described above, commercial haulers have some access to Resco’s facilities.

4. County-owned transfer stations

Westchester County owns three transfer stations to accommodate solid waste generated by the IMA communities (this excludes recyclables, which are handled at the “MRF” in Yonkers).²⁵ These transfer stations are all located in the lower part of the County. Several communities in Northern Westchester do not use transfer stations but instead transport their refuse directly to Resco because of their relative proximity to the Resco plant in Peekskill.²⁶

County-owned transfer stations are located in Yonkers, White Plains, and Mount Vernon.²⁷

Although the County owns the transfer stations and most of the trucks used to haul the trash from the transfer stations to Resco, it contracts with a private hauler to operate the transfer stations, provide this transportation service, and operate the "MRF" plant (for recyclables) in Yonkers. [Currently, the County contracts with Trottown Transfer, Inc., an affiliate of Suburban Carting Corp., to perform all these functions.]

County-owned transfer stations cannot accept commercial waste.²⁸

Information provided to the Committee by the Department of Environmental Facilities and attached to this report as Appendix "6" summarizes the amounts of waste generated in the categories and for the years indicated.

5. The "MRF"

Recycling became an integral part of solid waste management in Westchester County in the late 1980s as state law and local needs mandated new and improved approaches to handling an ever-increasing waste stream.

In February of 1988, the County Executive submitted to the Board of Legislators a "Comprehensive Recycling Plan for Westchester County." This plan proposed the inclusion of recyclable materials in a solid waste management strategy.²⁹

In May of 1988, the consulting firm of Malcolm Pirnie, Inc. issued a report analyzing the long-term needs of the County's Solid Waste Management Plan.³⁰ This report indicated that eight hundred fifty thousand (850,000) tons of solid waste were generated each year within the District. The report further indicated that seventeen per cent (17%) of the total waste stream consists of yard waste and, of that amount, between twenty-five (25) and thirty (30) per cent was comprised of leaves.³¹

Malcolm Pirnie's report concluded that, based upon projections and the waste disposal capacity at Charles Point, a recycling program would have to reduce the solid waste stream by thirty two per cent (32%) by 1995 in order to avoid the need to increase disposal capacity.³² Furthermore, in

order to eliminate the need for additional long-term storage capacity, the County would have to improve its recycling rate by approximately 6% annually from 1995 through 2010.³³

The State of New York mandated recycling with the passage of the Solid Waste Management Act of 1988. A Comprehensive Solid Waste Plan for Westchester Update was completed and approved in 1991. Westchester County's Source Separation Law mandating recycling on the local level was passed in 1992.

Therefore, the Daniel B. Thomas Material Recovery Facility was built and opened in 1992 to make a basic infrastructure available to municipalities as they developed and implemented their recycling programs throughout the County.

As a result of this new recycling effort, Westchester's cities, towns, and villages were once again presented with the opportunity to participate in an Inter-Municipal Agreement ("IMA").³⁴ Pursuant to this agreement, the municipalities would bring their recyclables to the MRF, and the County would either absorb the cost of, or derive a benefit from, the marketing of the materials. The IMA communities pay no tipping fees, but actually derive a further benefit from this arrangement. By recycling materials at the MRF, the municipalities avoid the per ton transfer station tipping fees of

approximately \$21.00 which would otherwise be incurred if the recyclables were handled as “ordinary” trash disposed of at county transfer stations.

Information provided to the Committee by the Department of Environmental Facilities and attached to this report as Appendix “6” summarizes the amounts of waste processed at the MRF and the revenue generated in the categories and for the years indicated.

B. PRIVATE SECTOR

1. *Privately-owned transfer stations*

Privately owned transfer stations in Westchester are located in the "Six Towns" region, Peekskill, and Yonkers. Some Westchester carting companies have advised Sub-Committee staff that they also use transfer stations located in Connecticut or Rockland County. Presumably, these private facilities handle commercial waste prior to ultimate disposal at Resco or an out-of-county landfill, as well as residential waste generated by non-IMA communities, who are not permitted to use Resco.

The private transfer stations licensed by the DEC in 1998" were:

<u>Facility</u>	<u>Location</u>	<u>Capacity</u>	<u>Type of Waste</u>	<u>Disposal Site</u>
Blind Brook	Rye	70 tpd	MSW	Resco
A-1 Compaction	Yonkers	475 tpd 200 tpd	MSW C&D	Resco, PA.
Suburban	Mamaroneck	1200 tpd	MSW, C&D	Al Turi, Resco
Lincoln	Mount Kisco	352 tpd	MSW, C&D	Resco, Conn, PA.
Karta Ind.	Peekskill	500 tpd	MSW, C&D yard, recyclables	Conn, PA Va, KY, OH

J&R Finne	Bedford Hills 500 cyd	C&D	Resco, OH
Somers Sanitation	Somers 600 tpd	MSW, C&D Recyclables	(unavailable)
Bronx River Haulage	Mt. Vernon 200cypd	C&D	Bronx
Metro Enviro	Croton 700 tpd	C&D	(unavailable)

Private transfer stations surveyed by Sub-Committee staff reported tipping fees in the range of \$70 per ton in 1998. Area landfills reported charging around \$65.00 per ton, although that rate might be expected to escalate when New York City's Freshkill's landfill is closed and NYC carters are forced to seek alternative landfills.

2. *Communities outside of District No. 1*

Those communities which elected not to participate in an IMA in District No. 1 are: Lewisboro, North Castle, Pound Ridge, New Castle, Somers, North Salem and Bedford.

Clearly, the most significant consequence to these municipalities of their “non-IMA” status is their limited access to county-owned disposal facilities. This has led some communities to enter into contracts with carting companies who own their own transfer stations so that disposal to that level, at least, is assured.

3. *Public, quasi-public and private collection services*

There is no uniform system of trash collection among Westchester communities. Some IMA communities have their own sanitation departments which collect residential trash. Some municipalities provide commercial collection services to at least some of their constituents, albeit on a limited basis (i.e. White Plains).

Each of the six non-IMA towns has private collection of its residential trash. Some of these communities contract directly with a trash hauler to handle collection (i.e. New Castle). Others (i.e. Lewisboro) have

an "open market" system and report that one or two private haulers collect residential garbage in their jurisdictions.

Some IMA communities do not have their own sanitation departments but instead have entered into contracts with private companies to provide for residential collection (i.e. Yorktown, Pelham, Rye Brook). Furthermore, some communities, both IMA and non-IMA, contract with private haulers for disposal of municipal trash (i.e. Lewisboro, Westchester County).

Input from each municipality (including a request for reports on collection problems and issues encountered in each jurisdiction) was solicited by the Sub-Committee in March of 1998 *via* survey; most communities responded and their surveys are a part of the record assembled by the Sub-Committee (attached as Appendix 5).

4. *The public bidding experience*

In addition to soliciting input from Westchester communities *via* survey, the Sub-Committee conducted interviews through Sub-Committee staff of municipal officials in jurisdictions having contracts with private haulers. Certain themes emerged:

i. Generally, only two or three companies respond to public bids/requests for proposals;

ii. Price, continuity of service, access to transfer stations and the carting company's experience in handling residential waste were all reported as significant factors in analyzing service proposals and awarding contracts.

For example, one municipal official acknowledged awareness of Thomas Milo's then-pending indictment at the time he reviewed a proposal submitted by a Suburban affiliate, and had concerns about Milo's possible organized crime connections. Nonetheless, this jurisdiction selected the Milo company over two other bidders because of long-term price guarantees and assured long-term access to a transfer station and landfill.

5. *Cost of Commercial Collection*

Information about prices for commercial carting services in Westchester risen assembled by the Sub-Committee shows that prices have consistently throughout the mid-1990s and may be higher here than in New York City.

The Sub-Committee heard testimony that, for example, in late 1995, one owner of a large office park paid from \$.14/square foot to as much as

\$.31/square foot for the various buildings in the complex.³⁶ By comparison, that owner paid between \$.03 and \$.10/ sq. ft. for office space it owned in Manhattan during the same period. The Manhattan costs dropped further after the NYC trade waste regulations were fully implemented.

III. SOLID WASTE: A CONTROLLED INDUSTRY

A. CORRUPTION - A REGIONAL PROBLEM

1. *The property rights system*

In the Gigante, et al. 1996 indictment, U.S. Attorney Mary Jo White defined organized crime's formula for control of the carting industry as a "property rights system":

"Between at least the late 1950's and [1996], the waste disposal, or garbage hauling, industry in the New York metropolitan area has been governed by what has come to be known as the property rights system...Under this property rights system, waste disposal companies affiliated with certain organized crime groups have asserted, without legal justification, that they have a permanent property right to every location or 'stop' where they pick up garbage or waste..."³⁷

Indeed, the property rights system appears to lie at the heart of organized crime's stranglehold on the carting industry, its participants, and the consumers who rely on its services.

Therefore, in order to analyze the impact of the property rights upon Westchester County carting industry, the Sub-Committee considered it to be useful and important to examine the patterns and practices of the industry as

observed within neighboring New York City. Not surprisingly, the record shows that New York City's carting industry was also controlled by a property-rights system. The impact of the property rights system upon New York City's carting industry—and consumer—is discussed below:

2. *New York City's Experience*

At its December 3, 1997 public hearing, the Sub-Committee heard testimony from two individuals at the forefront of New York City's offensive against mob control of the solid waste industry: Edward Ferguson, Chairman and Executive Director of New York City's Trade Waste Commission, and Chad Vignola, Deputy Commissioner. Both former federal prosecutors, they each explained how organized crime has operated for four decades in Westchester's southern neighbor, New York City, and in Westchester. They both noted that, while the United States Attorney and the Manhattan District Attorney had been successful in prosecuting individuals and cartels that controlled the industry for many years, regulatory reform was the vital stimulus necessary to open the industry to vigorous competition.

Commissioner Ferguson described the control of the carting industry in this fashion:

"...For decades, a criminal cartel of carting companies, operating under the auspices of and beholden to La Cosa Nostra, have kept competition out of the industry with a wide range of anti-competitive practices, including customer allocation, price fixing, and bid rigging.

"The cardinal rule of the cartel was that there shall be no competition. As a result, customers had no choice about what carting company they would have to use. Instead, carting companies treated customers like chattel, trading, buying and selling them like baseball cards to round out their collection.

"When there is no competition among providers of a needed service, the inevitable results are inflated prices charged to the consumers and inflated profits reaped by the suppliers. That has been the state of affairs in New York City and Westchester County for decades. Carting companies in the New York metropolitan area who depended on private garbage haulers, be they businesses, as in New York City, or businesses, residents and municipalities, as in parts of Westchester County, have for decades paid prices far in excess of the rate prevailing around the nation.

"That excess went into the pockets of the carting companies and the cartels, many of which were owned or controlled by organized crime and all of which owed allegiance to the mob for running and enforcing the cartel.

"Hundreds of millions of dollars have been diverted from carting companies and cartels and to organized crime on account of this long standing activity..."³⁸

3. *Westchester's Carting Industry*

a. *The Hinchey Report- An Early Warning*

In 1986, the New York State Assembly Environmental Conservation Committee, chaired by then-Assemblyman Maurice D. Hinchey, conducted an investigation of the carting industry in order to determine the extent to which the industry had been corrupted and controlled by organized crime. The Committee issued a report on its findings in 1987.³⁹

Of particular relevance to Westchester County were those portions of the report which focused on the evolution of the role of the Genovese and Gambino crime families in the solid waste management business from the 1950s through the mid-1980s. Indeed, for Westchester County, the Hinchey Report presented a dire image of an industry pervasively dominated by the Genovese and Gambino crime families and their associates, with mobsters virtually dictating how and by whom trash was collected—and how much the consumer would pay for the services.

At the December 3, 1997 Sub-Committee hearing, the Hinchey Report was accepted into the record of the proceedings.

However, it is important to note that the Hinchey report was not the first time that allegations of corruption in Westchester's trash hauling industry had been brought to the attention of the public. Indeed, Westchester County newspapers have for decades been reporting on investigations, prosecutions and convictions of organized crime figures involved in trash hauling in this County and in the surrounding area.⁴⁰

b. The Martin Report – Another Warning

In 1987, County Executive Andrew O'Rourke commissioned Lawrence N. Martin, Esq., a former state Supreme Court Justice, to investigate the circumstances under which the County had awarded certain public contracts, and extensions and amendments to those contracts, for the operation of the County-owned transfer stations. The original contract had been awarded in or around 1981 to I.S.A. in New Jersey, Inc. ("I.S.A"), owned by Louis and Robert Mongelli, and had been extended and amended on various occasions since the original contract date.

In reviewing the history of the I.S.A. contracts, Judge Martin interviewed current and former County employees in the Department of Public Works and the Division of Solid Waste, the former Executive Officer of Westchester County, Vincent Castaldo, as well as the principals of I.S.A.

Judge Martin issued a report at the conclusion of his investigation which was sharply critical of the County's management and administration of its contract with I.S.A. He concluded that the changes which had been made to the I.S.A. contract, virtually all of which had been highly favorable to the contractor and of questionable benefit to the County, "had been of such magnitude as to violate both the letter and the spirit of the statutory bidding procedure..."⁴¹ He also recommended that Westchester County

"...put together a permanent transfer facility set up under direct County control or under the control of an independent solid waste authority. The private carting industry is generally perceived as being controlled by organized crime and government should do nothing to subsidize companies so perceived by the public. Contracting out the transfer station will only result in further problems in trying to regulate the contractor and police the County employees overseeing the contractor."

c. Indictments/Convictions

At its December 3, 1997 public hearing, the Sub-Committee reviewed and accepted into its record the Indictment of Mario Gigante, Thomas Milo, Suburban Carting Corp., and various co-defendants in the U.S. District Court for the Southern District of New York, as well as the superseding Informations and Plea Allocution Minutes of the various individuals and

corporations who had entered guilty pleas as of the date of the Sub-Committee hearing.⁴²

At its November 5, 1998 public hearing, the Sub-Committee heard the details of the federal probe which led to the indictments and convictions from the FBI agents who had led the investigation into Westchester's troubled carting industry. A summary of that investigation is contained in the next section of this Report.

d. Federal Investigation

i. Genovese/Gambino property rights

As noted above, at its November 5, 1998 hearing, the Sub-Committee heard testimony concerning the extent to which organized crime has controlled the industry in Westchester County and enforced its control with violence, threats of violence and anti-competitive practices. Documentary evidence was also introduced on these dates and was made part of the record of the proceedings.⁴³

Testimony at these hearings focused on the nature and control of the carting industry by factions of the Genovese and Gambino organized crime groups. The Sub-Committee heard testimony about the activities of Mario Gigante, Thomas Milo, and Suburban Carting Corp., and the conduct that

resulted in the federal prosecution which was commenced in 1996 by the United States' Attorney's Office. The Sub-Committee also heard testimony delineating specific illegal and anti-competitive practices utilized by organized crime in the Westchester marketplace, and the consequences of such practices, from the perspective of law enforcement, the industry, and the consumer.

The Sub-Committee was shown, once again, that the "property rights" system, as described by Special Agent Daniel A. Butchko of the FBI⁴⁴, has dominated the waste hauling industry in the New York metropolitan area for some time:

"...Under the 'property rights system', if a trash hauling company is backed by organized crime and is servicing a location, no other company is allowed to compete for that location. That location permanently 'belongs' to the organized crime company that handles it, even if the customer wants to change companies upon the expiration of a contract, and even if a new customer moves into the location.

"If a waste carting company 'steals' a stop that 'belongs' to an organized crime-backed company, such as by offering lower prices or better service, the property rights system demands that the stop has to be returned or acceptable compensation has to be paid. If the companies cannot agree among themselves and both companies are backed by organized crime, there is a 'sit-down' with the companies' respective organized crime sponsors, who resolve the dispute.

"If the company that 'steals' a stop is not backed by organized crime, or if a mob-backed company tries to ignore the 'property rights' rules, it may receive warnings or threats. If these don't persuade it to give back the stop or pay

compensation for it, the company may suffer damage to its equipment or even physical violence against the company's owners or employees.

As a result of the property rights system, waste carters have succeeded in reducing competition and in charging above-market rates to customers. Moreover, the property rights system has been a major source of revenue for organized crime, because the mob-backed firms pay a hefty percentage of their inflated profits to their organized crime sponsors... ”⁴³

In testimony which further chronicled a history of extortion, bribery, official corruption, violence and threats of violence spanning four decades and encompassing virtually every aspect of garbage collection and disposal in Westchester, Agent Butchko described methods by which the property rights system has been enforced and perpetuated in Westchester County by Genovese crime family “capo” (captain) Mario Gigante, associate Thomas Milo and their various co-conspirators as identified in the federal investigation of *Gigante et al.*“

ii. Corruption - transfer station contracts

Agent Butchko’s testimony also revisited questions raised by Judge Martin, and answered others, when he described the manner in which public contracts for the operation of county-owned transfer stations and the MRF had been awarded by Westchester County in 1981, amended in 1983, and

awarded again in 1992. Indeed, Agent Butchko's testimony illustrated how the manner in which these contracts were bid, awarded and/or amended was antithetical to the public interest and an abhorrent violation of the letter and spirit of the law.

(a). 1981 contract. The Sub-Committee was told that the 1981 contract transfer station contract was awarded to ISA in New Jersey, Inc., a mob-controlled company, as the result of a "sit down" among high-ranking members of the Genovese organized crime family. These individuals determined among themselves who the "low bidder" would be. The public bidding process was superfluous to their methodology. Amendments to the 1981 contract which were made in 1983 and which were highly favorable to ISA were the product of \$200,000 cash payment to the then-Executive Assistant to the County Executive. According to Agent Butchko:

*"...this bribe was paid at a point in time when the County was considering purchase of its own trailers and take-over of transfer station operations."*⁴⁷

Agent Butchko's testimony concerning this contract mirrored the findings of Hon. Lawrence N. Martin, Jr., a former State Supreme Court Justice, whose report was summarized above in Section (A)3(b).

Agent Butchko also detailed an "agreement" among high level members of the Genovese and Gambino crime families, ISA's owners (the Mongellis), and Thomas Milo to split the profits from the Westchester contract in the following manner: 25% to Milo; 25% to be split between Gambino caporegime Joseph Zingaro and Genovese caporegime Matthew Ianiello; 25% for the Mongellis to split with Mario Gigante; 25% to Genovese *caporegimes* Barney Bellomo and Benny Villani, who had ownership interests in other carting firms in the area. According to the FBI, the "mob tax" on this contract was \$400,000 per month.⁴⁸

(b). 1992 contract. In 1992, the Westchester County transfer station contract was up for renewal. The Request for Proposal process was duly initiated. However, the FBI's investigation revealed that the process for awarding that contract was again to be determined by Genovese *caporegimes*, including Mario Gigante. Thomas Milo's company was to be the successful bidder; Westchester's consumers once were forced to pay a "mob tax" on this contract:

"...Gigante also told Mongelli [of ISA] ...that Milo's company would be winning the Westchester County transfer station contract, and that the Mongellis would receive their share [of the profits] through Gigante, under the transfer station agreement. However, Gigante explained that 20% would be coming off the top, because Milo had told Gigante

that Milo had to pay a bribe to an individual whom Gigante did not identify."⁴⁹

iii. The United States of America v. James Ida et al

The Sub-Committee found further indicia of the vitality of the influence of organized crime in Westchester County in a recent case known as "*The United States of America v. James Ida et al.*"⁵⁰

In or around 1996, a federal jury convicted James Ida of racketeering, among other criminal offenses. At the time of his conviction, James Ida was the *consigliere*, or counselor, of the Genovese crime family, a position of very high standing within that organization.

The criminal trial jury further found that James Ida should forfeit all of his right, title and interest in a \$900,000 house in Katonah, inasmuch as this property constituted, or was derived from, the proceeds of the racketeering activity of which Ida now stood convicted. Based upon the jury's verdict, the federal court entered an order of forfeiture of Ida's Katonah property to the United States.

This forfeiture order was challenged by an associate of James Ida's, James Hickey. At the time of Ida's conviction, Mr. Hickey had interests in several waste hauling companies in Westchester County, including Valley

Carting and Hudson Waste Haulage. The basis of Mr. Hickey's challenge was his claim that he, and not Mr. Ida, owned the Katonah property.

Mr. Hickey's claim was reviewed by District Judge Lewis A. Kaplan, who found that Hickey was a front for Ida's actual ownership of the Katonah property. The Court further founds that Ida had concealed his actual ownership, with Hickey's assistance, because of Ida's substantial participation in criminal activities on behalf of the Genovese crime family and his need to distance himself from the illicit wealth he derived from those activities. Judge Kaplan denied Mr. Hickey's petition, finding Mr. Hickey's assertions regarding ownership of the property to be unpersuasive and deceptive.

In its totality, the *United States of America v. James Ida et al.* forfeiture case stands as a further signal of the close and disturbing nexus between organized crime and the trash hauling industry within Westchester's borders.

e. The Customer Experience

Some of the less obvious, more insidious manifestations of the property rights system were detailed in the testimony of Agent Butchko, former FBI Supervisory Agent Thomas French, and Great Forest, Inc.

consultant Barbara Fischer. Indeed, the testimony of these witnesses established that service contracts containing "evergreen clauses," onerous liquidated damages provisions, right to compete clauses, etc. are potent anti-competitive tools. Other practices include price fixing, collusive bidding, contract assignments, and linking services (one manifestation of this practice requires a customer to use a single provider for all services). The Sub-Committee also heard testimony from Ms. Fischer concerning the impact of such anti-competitive practices on the price of services in Westchester, which in many instances appears to be higher than in neighboring Manhattan. Indeed, the cost differential between Westchester and New York City is particularly apparent since the advent of the Trade Waste Commission and the regulatory scheme created by the New York City Council in 1996 to combat the influence of organized crime in the five boroughs.

The Sub-Committee collected a sampling of contracts in current and common use in Westchester County and has found most such contracts to contain one or more anti-competitive terms. An extensive discussion of these contracts occurred at the Sub-Committee hearing conducted on November 12, 1998, and contracts illustrating these anti-competitive terms became a part of the record on that date.

Sub-Committee staff interviewed a number of small businesses throughout the County to ascertain the impact of the anti-competitive practices outlined above. Sub-Committee Staff member Thomas French, a former FBI supervisory agent, detailed the results of some of these interviews in testimony heard by the Sub-Committee on November 24, 1998. He described a "commonality of problems" experienced by these businesses in dealing with their trash hauling companies:

" ...Most of the commercial customers had little knowledge of what constitutes a fair market rate for commercial pickup. Many were dismayed by the disparity of pricing between businesses of comparable size, materials and volume of pickup...They were frustrated by the restricted nature of contracts they were compelled to sign. Despite having a contract which was supposed to lock in their price of the pickup rate for a specified period of time, most experienced significant price increases within that time period. When customers complained about rate increases, they were told that dumping fees had increased and those increases were being passed along pursuant to the articles of their contract. Customers who complained were told there is nothing they could do until their contract terminated. If the customer attempted to terminate his contract before the due date, he was forced to give the hauler liquidated damages and was subject to a penalty of 30 per cent of the monthly service charge for the remainder of the contract. Refusal to pay these increases have led to merchants being summoned to court by the carting company. This has resulted in expensive legal fees that tax the small businessman who is operating on a small profit margin..."⁵¹

A different perspective on the customer experience was provided to the Sub-Committee on November 24, 1998 by Michelle Celarier, a Croton-on-Hudson resident involved in a “grassroots” investigation of the purported owners of a construction and demotion plant operating in her village. According to Ms Celarier, she and her fellow researchers were routinely frustrated by the lack of disclosure of financial records, lease arrangements, corporate ownership, etc. required from companies being licensed by state and local government.

As Ms. Celarier stated in her introductory remarks:

“...Today, it is virtually impossible to determine with any certainty the owners of an individual waste hauling company should it choose to hide their identity. And without such knowledge, it would be virtually impossible to eradicate the prominent role organized crime plays in the industry. I believe my comments will point to the necessity for much tougher financial disclosure requirements and monitoring standards than we have in this County today...”⁵²

f. Justice Department Input

The Sub-Committee met with representatives of the United States Justice Department, Antitrust Division to discuss anti-competitive practices which have been used by monopolists operating in other markets. Copies of stipulations and consent decrees between the U.S. Department of Justice, Browning-Ferris Industries and U.S.A. Waste Services, Inc. were made part of the record of the November 24, 1998 hearing. These materials contain findings by the Justice Department on anti-competitive practices which are germane and relevant to conduct occurring within Westchester's borders.

g. Legal Records- Law Suits

The Sub-Committee conducted its own review of public records and court files to determine patterns of anti-competitive activity, some of which have actually been litigated and judicially enforced.

This section of this memorandum highlights evidence reviewed by the Sub-Committee which demonstrates the effects of the unlawful "property rights system" which continue to infect the Westchester waste hauling market through the present. It is instructive of the measures taken by

organized crime in recent years within our own borders and in our own courtrooms to enforce an illegal agreement.

This section also addresses how onerous contractual provisions have strengthened the ability of organized crime to prevent competition:

i. A-1 Compaction v. Suburban et al.

In late 1993 and early 1994 competition broke out in the Westchester Commercial Solid Waste ("CSW") market. This competition was documented in a series of lawsuits filed in 1994 and 1995 among the carters. These lawsuits drew press attention reflected in an August 6, 1995 article in the Gannett Westchester papers. One of Suburban's lawyers is reported to have said:

"Not only are the regular Westchester firms having to deal with a major public company like BFI, but the companies themselves, which heretofore confined themselves to traditional territories, are going out into other parts of Westchester to fight each other."

Prior to these competitive outbreaks, according to an FBI affidavit, there was another adjudicatory body which kept competition in check. As Agent Daniel Butchko in an affidavit seeking a search warrant³³ stated:

"36. CS-1 [Confidential Source -1] advised the FBI on or about September 12, 1988, that owners of the major carting

companies in the Greater New York area -such as A-1 Compaction, Inc. and Suburban Carting - have meetings to settle territorial disputes over the sanitation business in and around Westchester County. CS-1 stated that the first company to get a new account usually keeps that account, but that the major carters often conspire and then use violence and threats of violence to keep new carters out of the area..."

According to the indictment of Suburban Carting Corp., *et al.* (96 CR 466, SDNY 1996), and as noted elsewhere in this memorandum, waste hauling companies affiliated with La Cosa Nostra asserted, without legal justification, that they had a permanent "property right" to every location or "stop" where they picked up commercial solid waste. Once such a company established a "property right" to a particular stop, other waste disposal companies were not permitted to compete freely for that stop by, for instance, offering lower prices or better services. The carting companies enforced this scheme by: (a) the use of force and violence against people and property as well as the use and threatened use of economic reprisals; (b) collusive bidding and withholding of bids for private waste hauling and other contracts; (c) cash and other payments made by participants in the "property rights" system to each other and to members of La Cosa Nostra.

This cozy arrangement was threatened in late 1989 when A-1 Compaction considered selling out its business to Waste Management

Company, a national carting company not affiliated with La Cosa Nostra. Nick Rattenni, the principal of A-1, was advised that the sale to Waste Management was not acceptable to La Cosa Nostra, according to the Butchko affidavit referenced above.

Nick Rattenni apparently tried to work out the objections to his sales plan by meeting with the following La Cosa Nostra members and associates: Mario Gigante, Louis Corso and even Genovese *caporegime* Matthew Ianniello, a/k/a "Matty the Horse."⁵⁴ Louis Corso, part owner of A-1 Turi and Enviro Express, Inc., both companies controlled by Thomas Milo, accompanied Rattenni to a meeting with "Matty the Horse" in the Metropolitan Correctional Center for two hours. Another since-convicted *caporegime*, James Ida, also met with Rattenni on the same day as the meeting with Matty the Horse.⁵⁵

These meetings are consistent with a plan to let Rattenni know that Milo and Hickey were well-connected and that the sale of A-1 to Waste Management would not be considered favorable by the friends of these men.

Nick Rattenni decided not to sell his business to Waste Management in this 1989 to 1990 period. According to Nick Rattenni, in 1990 he did meet with "Thomas Milo for lunch in a diner in Mamaroneck, New York for the purpose of discussing the sale of A-1 to Thomas Milo or an entity under

his control.” (Affidavit of Albert “Nick” Rattenni dated November 12, 1997 submitted in *A-1 Compaction v. Suburban et al.*⁵⁶)

Rattenni further stated in his affidavit in the civil action:

“..[A]t least ten years ago I ran into Thomas Milo and James Gallente (sic) at the Ramada Inn in Armonk, New York, at which time Thomas Milo introduced me to James Gallente and in the latter’s presence, Thomas Milo said to me that he, Thomas Milo, is “the Boss,” that James Gallente takes “his orders” from Thomas Milo and that business decisions or acts taken by James Gallente are done with the prior approval of Thomas Milo.” On at least two subsequent occasions, Thomas Milo reiterated and ...admitted his control of the entities involved in this litigation. ... When I informed Thomas Milo that I was not interested in selling A-1 to him, he then reminded me that he controls all of my major competitors in Westchester and Putnam counties (in New York) as well as Fairfield County in Connecticut and that soon, I may find it difficult to stay in business...”

The foregoing testimony is consistent with the existence of a property rights system controlled by Milo and enforced by La Cosa Nostra.⁵⁷

Eventually, after the indictments of the La Cosa Nostra members and associates and several of the Milo controlled carting companies in 1996, Nick Rattenni did sell out in June of 1997 to Waste Management Inc.

ii. Competition in the Westchester Market: BFI arrives

In late 1993 or early 1994 a new competitor emerged in the Westchester market, Browning Ferris Industries ("BFI"). BFI was a national waste hauling company that had substantial waste hauling business throughout the United States. One response of the Westchester companies was to adopt a new form of contract that contained a number of clauses that can be appropriately termed "customer lock-in clauses." The market power achieved by virtue of the property rights system was extended by contractual arrangements that effectively locked in customers and locked out competition.³⁸

iii. Vertical arrangements and customer lock-in clauses

maintain the property rights system

The Sub-Committee has determined that major carters in the Westchester market have entered into written contracts with the vast majority of their existing customers. Many of these contracts contain terms that, when taken together in the relevant markets, make it more difficult and costly for customers to switch to a competitor and thus allow the entrenched companies to retain customers when approached by a competitor. These contracts enhance and maintain the leading companies market power in the

relevant markets by significantly raising the cost and time required by a new entrant or small incumbent firm to build its customer base and obtain efficient scale and route density. Therefore, the use and enforcement of these contracts in the Westchester markets raise entry barriers in those markets. Those contract terms are:

a. a provision giving Defendants the right to collect and dispose of all the customers' solid waste and recyclables; (exclusivity provision);

b. an initial term of three to five years (long term contracts);

c. a renewal term equal to the initial term that automatically renews unless the customer sends Defendants a written notice of cancellation by certified mail more than 60 days from the end of the initial or renewal term ("evergreen clauses");

d. a term that requires a customer that terminates the contract at any other time to pay Defendants onerous "liquidated" damages;

e. a "right to first refusal" clause that requires the customer to give Defendants notice of any offer by or to another solid waste hauling firm or requires the customer to give Defendants a reasonable opportunity to

respond to such an offer for any period not covered by the contract (“right of first refusal clause”);

f. A price escalation clause which permits the carter to raise the service charge to the customer if the carter’s dumping costs rise. This is inherently deceptive since, as in the case of Suburban and its affiliates and A-1 Compaction, the carters directly or indirectly own transfer stations and control the prices charged by the transfer stations.

The net effect of these clauses is that it is virtually impossible for a newcomer to compete unless he can successfully challenge these clauses. The cost of litigating these clauses in local courts on a case by case is enormous and success is doubtful.

An affidavit submitted and filed by an attorney for Suburban, dated December 3, 1997 in *Automated Waste Disposal et al v. A-1 Compaction, Inc. et al*,” recited that, prior to June 1996 “over eighty-five lawsuits had been instituted in the towns, villages and city courts of Westchester County against customers for breach of contract and seeking liquidated damages.” These lawsuits involved the alleged breach of the aforementioned customer lock in clauses.

The affidavit demonstrates that the customer lock-in clauses were vigorously enforced. Because these suits were brought in the town, village

and city courts, it was not practical to mount an antitrust challenge in such fora.

iv. Suburban v. BFI.

In 1994, Suburban sued BFI for tortious interference with its contracts.⁶⁰ The Suburban law suit was apparently modeled after another lawsuit brought by the Council of Trade Waste Associations, Inc., (the "Council") a trade association of which Suburban was a member. The Council and A.V.A., a small New York City carter, sued BFI of Metro New York. (Suburban's attorney's brief in *Suburban v. BFI* \Westchester Supreme 590/1994.) The New York City law suit, *A.V.A. v. Browning Ferris*, 2/25/94 N.Y.L.J. 22, (col. 3), (Judge Lebedeff) resulted in a ruling that was unfavorable to plaintiffs. The Court noted:

As is clear from the record, the contracts of the three moving former customers were been deemed renewed beyond their initial one year term by virtue of an "evergreen" clause. These three contracts are presented and each specifically states that the contract is annually renewed unless notice of termination is given during the contract term.

The starting premise for this argument is that these contracts fall into a category of service contracts governed by section 5-903(2) of the General Obligations Law, which states as follows:

"No provision of a contract for service, maintenance or repair to or for any real or personal property which states that the term of the contract shall be deemed renewed for a specified additional period unless the [customer] gives notice to the [contractor] of his intention to terminate the contract at the expiration of such term, shall be enforceable against the [customer], unless the [contractor], at least fifteen days and not more than thirty days previous to the time specified for serving such notice upon him, shall give to the [customer] written notice, served personally or by certified mail, calling the attention of [the customer] to the existence of such provision in the contract." (Emphasis supplied).

The Court held that the evergreen clauses were unenforceable by virtue of General Obligations Law 5-903(2) because the requisite notice was not sent. The Court then went on to find that the contracts for the extended term were thus terminable at will and claims for tortious interference with such contracts did not lie against BFI.

The Suburban suit against BFI was dismissed by stipulation of discontinuance.

v. *Suburban v. A-1 Compaction.*

The Sub-Committee further examined the court records of a series of lawsuits between Suburban and A-1 Compaction beginning in 1995. Each

of the parties claimed that the other was tortiously interfering with the other's contracts for waste hauling. Both companies' contracts contained the customer lock-in clauses described above.

One of Suburban's lawyers submitted an Affidavit that revealed that a practice had developed in which each Suburban and A-1 would defend the lawsuits brought against the customer by the other. The parties eventually settled that lawsuit by an agreement termed Stipulated Order of Settlement and Discontinuance dated June 26, 1996.

This Stipulated Agreement contains a number of clauses which are designed to dampen competition among the signatories and raise substantial antitrust questions.

The parties agreed not to make adverse comments concerning:

- The legality of the other parties contracts
- The enforceability of the other party's contract
- The legality of multi-year contracts
- That the liquidated damages clause was unenforceable
- That an automatic renewal clause was unenforceable.

It is thus manifest that an important element of the Stipulated Agreement is that neither would challenge the others customer lock-in clauses. Implicit in this arrangement is the understanding between the

parties that each of them would continue to have the customer lock-in clauses. The net effect of the agreement not to challenge each others' agreements was to narrowly constrict competition between the two companies.

The parties went beyond agreeing not to challenge each others' customer lock-in clauses; indeed, the parties agreed not to refer to the other party by name "or inference" in any marketing material or oral solicitation "including a comparison of its rates or service to those of the other party." (para. 8) This clause is clearly designed to chill the vigor of price competition.⁶¹ The parties agreed that they would not carry out a marketing effort focusing only on the customers of the other party. According to the Stipulated Agreement, their marketing efforts had to focus on geographic areas or types of business rather than on the customers of the other. Because the two companies and their affiliates had 70% of the CSW business in 1996, this agreement had a chilling effect on competition.⁶²

The parties agreed not to compete by providing free service during the term of another's contract. Given the renewal terms and other impediments to switching from one carter to another, this restraint impedes competition between the two largest carters.⁶³ Further examination of

the A-I/Suburban Stipulation reveals a minimum price clause which is apparently illegal. It reads:

"Neither party will provide service at a price below their actual cost including all elements of transportation, labor, income tax, etc."

The above quoted clause is an agreement to charge a price that covers fully allocated cost even though a marginal or average variable cost price might be to the competitor's long run interest and to the customer's advantage."

The anti-competitive purpose of the Stipulated Agreement is articulated in the "Attorney Affidavit" where he set forth that the "intent" of the Agreement was that the parties would "devote their energies and resources toward developing their own business, instead of fighting each other for the other's customers..." (Attorney Affidavit Para. 4.)

The most astounding thing about this agreement was that it was expressly reaffirmed by the lawyers for the parties in June of 1998.

That these agreements were designed to dampen price competition is demonstrated by the affidavits submitted in the *A-1 Compaction v. Suburban* suit that showed that the complained of competition resulted in price offerings at 50% below that of the competitor. There was no evidence in the court record that any of these sales were below any pertinent level of

cost. It was to end this price competition that the A-1 Compaction and Suburban suits were commenced. The Stipulated Agreement achieved the desired diminution of competition to the benefit of the carters and to the detriment of their customers. The Stipulated Agreement when considered as a whole and in light of the unlawfulness of its constituent elements constitutes powerful evidence of the present vitality of the property rights system in Westchester County.

B. New York City's Response – Local Law 42

In his testimony before the Sub-Committee, Commissioner Ferguson highlighted some of the key features of New York City's Local Law 42 and the work of the Trade Waste Commission as examples of what effective legislation can accomplish.

Commissioner Ferguson noted that Local Law 42 restricts the length of carting contracts to two years, adding the following comments concerning the evil addressed by this provision:

"...This addressed a pervasive problem in the industry, where carting companies signed their customers, who had no place else to go, to long-term contracts for three, five, ten years which were renewable automatically..."⁶⁵

Other key provisions cited by Commissioner Ferguson included the power of the Trade Waste Commission to (1) license the industry and deny a license to any applicant lacking good character, honesty and integrity; and (2) investigate the industry, chiefly in connection with the licensing process. The Trade Waste Commission has the power to subpoena books and records; take sworn testimony of carting company principals; conduct audits; approve the form of contracts that may be used by carting

companies; approve sales transactions between carting firms; require carting companies to provide wastestream survey data free of charge (to prevent overcharging).⁶⁶

Finally, Commissioner Ferguson cited the success of Local Law 42 in the (then) eighteen months since its passage:

"...Competition is being restored to the market. We are seeing an end to the mob tax ...Market prices for carting are down about 35 to 40 percent to what there were in June of 1996 when the law was passed. Competition is taking hold in all five boroughs....the annual savings thus far have been estimated to be about \$350,000,000...in a \$1.5 billion industry, which is what the carting industry in New York City is estimated to be, we are talking about a savings of about a third of that, if not more, that was the mob tax..."

"Also as a result of the reform effort, and I think equally important, individuals with questionable backgrounds are being removed from the industry..."

Commissioner Ferguson urged Westchester's passage of a regulatory scheme which would be "...strong enough to be a credible deterrent to corruption."

Deputy Commissioner Chad Vignola had the following additional observations to add regarding the possible efficacy of legislative reform:

"I suggest, at the outset, from the core of any successful reform effort to address the corruption in the Westchester County's garbage industry you need two things. You need an effective governmental response. But you need that response, second, to harness the marketplace. Because, ultimately, you will find or

we have found, at least in New York City, that our efforts are amplified and leveraged to the extent which we permit the market to take over and bring about probably the greater part of the reform..."⁶⁷

IV. FINDINGS

Based on the record compiled by the Sub-Committee, the Sub-Committee makes the following findings concerning the carting industry in Westchester County:

1. The carting industry has been corruptly influenced by organized crime for more than four decades.
2. Organized crime's corrupting influence has fostered and sustained a controlled environment in which carters do not compete for customers.
3. The controlled environment has been effectuated through a "property rights system" and enforced by cartel control of the industry.
4. The controlled environment has led to higher prices to the Westchester customer (a "mob tax") and customers have been compelled to enter into long-term contracts with onerous terms including "evergreen clauses."
5. Organized crime's corrupting influence has led to the commission of numerous crimes and wrongful acts, including physical violence, threats of violence and damage to property against both customers and competing carting firms.
6. The pervasive nature of the problem in the Westchester carting industry, and its anti-competitive consequences, continue.
7. Law enforcement efforts must be supplemented by regulatory initiatives to curb illegal and anti-competitive practices.
8. To insure lawful conduct by carting industry businesses and to protect the public interest, it is necessary to establish a new county-level

governmental agency to license and regulate businesses involved in the carting industry.

9. Vigorous competition and new entrants to the market must be encouraged.

V. RECOMMENDATIONS

Based upon the findings set forth above, the Sub-Committee recommends a strategy to eliminate the influence of organized crime on the solid waste industry in Westchester, repeal the “mob tax”, encourage competition, and provide Westchester residents and businesses with a “Customer’s Bill of Rights.”

- **The Sub-Committee therefore recommends that the Board of Legislators enact a new County law which would establish a Solid Waste Commission; set new licensing requirements designed to enhance the County’s ability to address organized crime’s corrupting influence; enhance consumer protections by providing residential, commercial and municipal consumers with a “Customer’s Bill of Rights;” encourage competition in the trash hauling industry by various means, including the establishment of an internet registry for customers actively seeking haulers (CASH Registry), with a view toward reducing consumer prices and improving the quality of service.**

Based on its investigation and hearings, the Sub-Committee, assisted

by the County Attorney, has drafted a licensing law for Westchester County. (Appendix 16) This proposed law is a revision and broadening of the current Westchester County Solid Waste and Recycleables Collection Law. It is designed to (1) implement the County's Solid Waste Management Plan, (2) address the influence and the threat of influence of organized crime in the solid waste and recycling industries in Westchester County, and (3) encourage competition and new entrants to the industry.

New York City's Local Law 42 serves as a model for this legislation. The Sub-Committee also had the benefit of a review of the State of New Jersey's licensing statute and similar legislation adopted in the Town of Clarkstown, New York.

The new County law would:

1. establish a Westchester County Solid Waste Commission, to:

- a. license, register and monitor all solid waste businesses;
- b. set standards for customer service, set requirements for service contracts, and develop and implement consumer education programs;
- c. set fees for all licenses and registrations;

- d. investigate all matters within its jurisdiction.

2. enhance licensing requirements for businesses in the solid waste industry, by requiring:

- a. that all applicants for Class A, B, C, D and E licenses and solid waste brokers submit applications on forms to be determined by the Commission;
- b. that the Commission determine the good character, honesty and integrity of all applicants;
- c. standards for applications, denials, refusals, suspensions, revocations, non-renewals, or modifications of licenses;
- d. standards for conduct of licensees and registrants.

3. protect the consumer and encourage competition, by:

- a. requiring written service contracts;
- b. setting standards for terms and conditions of service contracts, including the prohibition of liquidated damages provisions, automatic renewal clauses (also known as "evergreen clauses"), and other anti-competitive contractual terms;
- c. declaring all existing service contracts terminable at will by the customer on the implementation date of the legislation;
- d. limiting the terms of all contracts to two years (except under a municipality waiver provision);

- e. requiring that all contracts have attached to them a uniform notice entitled "Customer's Bill of Rights."
- f. establishing an internet registry for customers actively seeking haulers (CASH Registry).

A synopsis of the proposed legislation is attached as Appendix 15.

- **The Sub-Committee also recommends that the County Executive conduct a careful review of the current system by which County-owned transfer stations and related facilities are operated and managed and report his findings to the Board of Legislators. As a further part of his review, the County Executive should consider allocating space to commercial trash haulers at County-owned transfer stations as a means of stimulating competition and encouraging new entrants to the solid waste industry.**

At present, there is one contract for operation of the transfer stations (including the Material Recovery Facility) and transportation of trash to the RESCO "garbage to energy" plant at Charles Point, with one vendor providing these vital services.

The record assembled by the Sub-Committee reveals that the awarding of substantial public contracts in the past was tainted by corruption.

In 1983, at a point when Westchester County was considering bringing the operation and control of the transfer stations "in house", the County decided to amend the existing contracts with I.S.A. in New Jersey, Inc. and to continue to outsource the services to that company. The Sub-Committee has been informed that I.S.A. in New Jersey, Inc. was a "mob-controlled" entity whose owners paid homage and tithe to the Genovese and Gambino crime families.

In 1987, Judge Lawrence N. Martin reviewed the County's decision-making. His report shows that the County officials then involved had not satisfactorily explained why the decision was made to continue to outsource the services. FBI Agent Dan Butchko's testimony before the Sub-Committee provided a possible explanation: a high-ranking County official was purportedly paid a \$200,000 bribe by organized crime figures at or about the time that the County made its decision.

The FBI presented to the Sub-Committee information about possible corruption of the public contract process in connection with the 1992 Trottown contracts under which the transfer stations and the MRF are presently being operated.

The Sub-Committee recommends that the County re-consider how and by whom these vital services are provided. In particular, the Sub-Committee recommends a study of the feasibility of outsourcing the various components of the current contract to more than one vendor and/or bringing "in house" all or part of the operation and management of these vital services. The Sub-Committee strongly urges the County Executive to address the basic, fundamental policy questions of how and why these services were outsourced in the first instance, and then consider whether the current, single contract should be divided into two or more components.

The Sub-Committee is aware that, after a suggestion was recently made by its members, County Executive Andrew Spano commenced a study of the transfer station operation and is considering the feasibility of the County taking over the management of these facilities. The Sub-Committee believes that an analysis of the merits of County management vs. continued

privatization must go beyond a cost comparison between Trottown's present services and the projected cost of bringing the operation "in-house." The Sub-Committee recommends that the County Executive's study include a full and complete financial audit of transfer station operations, the MRF, and transportation of trash to Charles Point, as well as an efficiency study of current management of these critical services.

Finally, the Sub-Committee recommends that, as part of its overall review of the transfer stations operations, the County examine the possibility of allocating space to commercial trash haulers.

Many trash haulers interviewed by the Sub-Committee believe that access to competitively priced, conveniently located transfer stations is key to fostering competition in the solid waste industry in Westchester County.

Currently, most transfer stations are controlled by the County (and thus unavailable to commercial trash haulers), or by entities also in the collection business (and thus in direct competition with haulers seeking access to their transfer facilities). Companies that own, or are related to companies that own, transfer stations are at a distinct competitive

advantage, an advantage which creates a clear barrier to new competitors.

Therefore, the Sub-Committee recommends that the County find a means to make some space at County-owned transfer stations available to commercial haulers. The Sub-Committee recognizes that, as with any major reform effort, such a bold initiative may face considerable legal and practical impediments. However, the Sub-Committee believes that the County ought to expend whatever effort is necessary to overcome possible obstacles.

The influence of organized crime on the solid waste industry in Westchester County has existed for far too long. County Government must remedy the problems caused by an illegal "property rights" system. The Sub-Committee strongly urges the Board of Legislators and the County Executive to act now.

¹Indictment No. 96CR466 (JSR); United States District Court, Southern District of New York; Exhibit 1 of December 3, 1997

²*Id.*

³*Hearings before the Sub-Committee on Trash Haulers*, Westchester County Bd. of Legislators, December 3, 1997.

⁴*Hearings before the Sub-Committee on Trash Haulers*, Westchester County Bd. of Legislators, December 3, 1997.

⁵Westchester County Solid Waste Management Plan Update (1991), p. 1-1.

⁶*Id.*, p. 1-1.

⁷*Id.*, p. 1-2.

⁸Bond Prospectus, County of Westchester Industrial Development Agency, February 1, 1994.

⁹Westchester County Solid Waste Management Plan Update (1991) p. 1-2.

¹⁰*Id.*, p. 1-2

¹¹Information provided to Sub-Committee by Department of Environmental Facilities.

¹²Westchester Resource Recovery Facility Disposal Agreement, Amendment dated February 1, 1994

¹³Information provided to Sub-Committee by Department of Environmental Facilities.

¹⁴Information provided to Sub-Committee by Department of Environmental Facilities.

¹⁵Information provided to Sub-Committee by Department of Environmental Facilities.

¹⁶Information provided to Sub-Committee by Department of Environmental Facilities.

¹⁷Information provided to Sub-Committee by Department of Environmental Facilities.

¹⁸Information provided to Sub-Committee by Department of Environmental Facilities.

¹⁹Information provided to Sub-Committee by Department of Environmental Facilities.

²⁰Information provided to Sub-Committee by Department of Environmental Facilities.

²¹According to statistics maintained by the Westchester County Department of Environmental Facilities, in 1997, municipally collected waste recycling programs collected 260,376 tons, achieving a recycling rate of 34.8%. Privately collected waste recycling programs collected a reported 308,547 tons, achieving a recycling rate of 46.5 percent.

²²Information provided to Sub-Committee by Department of Environmental Facilities.

²³Information provided to Sub-Committee by Westchester Resco staff.

²⁴Information provided to Sub-Committee by Department of Environmental Facilities.

²⁵Information provided to Sub-Committee by Department of Environmental Facilities.

²⁶Information provided to Sub-Committee by Department of Environmental Facilities.

Information provided to Sub-Committee by Department of Environmental Facilities.

²⁷Information provided to Sub-Committee by Department of Environmental Facilities.

²⁸Information provided to Sub-Committee by Department of Environmental Facilities.

²⁹Report and Recommendations of Westchester County Solid Waste Agency 5/18/89; "*In the Matter of the Proposed Modification of District Plan for Refuse Disposal District #1, in the County of Westchester, to include a Materials Recovery Facility and Yard Waste Recycling Project.*"

³⁰*Id.*, at p. 8.

³¹*Id.*, at p. 8.

³²*Id.*, at p. 9.

³³*Id.*, at p. 9.

³⁴Information provided to Sub-Committee by Department of Environmental Facilities.

³⁵Information provided to Sub-Committee by Department of Environmental Facilities.

³⁶*Hearings before the Sub-Committee on Trash Haulers*, Westchester County Bd. of Legislators, December 3, 1997.

³⁷United States v. Gigante et al, 96 Cr.466 (JSR)

³⁸*Hearings before the Sub-Committee on Trash Haulers*, Westchester County Bd. of Legislators, December 3, 1997, transcript at pp. 34-35.

³⁹*Hearings before the Sub-Committee on Trash Haulers*, Westchester County Bd. of Legislators, December 3, 1997, Exhibit 4.

⁴⁰Cf. Appendix 14.

⁴¹*Hearings before the Sub-Committee on Trash Haulers*, Westchester County Bd. of Legislators, November 5, 1998; "Investigation of Contract between the County of Westchester and I.S.A. in New Jersey, Inc", pp. 13-14.

⁴²*Hearings before the Sub-Committee on Trash Haulers*, Westchester County Bd. of Legislators, December 3, 1997.

⁴³*Hearings before the Sub-Committee on Trash Haulers*, Westchester County Bd. of Legislators, November 5, 12 and 24, 1998 (Appendices 10,11, and 12).

⁴⁴Agent Butchko was case agent for the FBI's investigation of Suburban Carting Corp., *et al.*

⁴⁵*Hearings before the Sub-Committee on Trash Haulers*, Westchester County Bd. of Legislators, November 5, 1998, Transcript of Hearing pp. 26-28.

⁴⁶*Hearings before the Sub-Committee on Trash Haulers*, Westchester County Bd. of Legislators, November 5, 1998, Transcript of Hearing.

⁴⁷*Hearings before the Sub-Committee on Trash Haulers*, Westchester County Bd. of Legislators, November 5, 1998, Transcript of Hearing p.37.

⁴⁸*Hearings before the Sub-Committee on Trash Haulers*, Westchester County Bd. of Legislators, November 5, 1998, Transcript of Hearing p.38.

⁴⁹*Hearings before the Sub-Committee on Trash Haulers*, Westchester County Bd. of Legislators, November 5, 1998.

⁵⁰§196 Crim. 430 (LAK).

⁵¹*Hearings before the Sub-Committee on Trash Haulers*, Westchester County Bd. of Legislators, November 24, 1998, Transcript of Hearing pp. 6-7.

⁵²*Hearings before the Sub-Committee on Trash Haulers*, Westchester County Bd. of Legislators, November 24, 1998, Transcript of Hearing p. 30.

⁵³*Hearings before the Sub-Committee on Trash Haulers*, Westchester County Bd. of Legislators, November 24, 1998, exhibit in evidence.

⁵⁴*Id.* at Paras. 48-52.

⁵⁵*Id.* at Para. 53.

⁵⁶New York State Supreme Court, Westchester County Index No. 2672/95.

⁵⁷In essence, the Westchester carters had a collective monopoly which was illegal and policed by the La Cosa Nostra. An allocation of customers is a *per se* violation of Section One of the Sherman Act. The law is clear on the issue. In *United States v. Topco Assocs.*, 405 U.S. 596 (1972), for example, the Supreme Court, rejecting a decision by a Federal District Court that a case was governed by a "rule of reason", held an agreement and conduct analogous to that charged here was a *per se* violation of the Sherman Act. The Supreme Court stated, "[o]ne of the classic examples of a *per se* violation of [the Sherman Act] is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition" (405 U.S., at 608).

More recently, the Supreme Court reiterated its position that an allocation of markets was a *per se* violation of the Sherman Act in *Palmer v. BRG of Ga.*, 498 U.S. 469 (1990). There, BRG of Georgia, Inc. and Harcourt Brace Jovanovich Legal and Professional Publications both offered Bar review courses in the State of Georgia. The two entities agreed, among other things, that Harcourt would not compete in Georgia and BRG would not compete outside of Georgia. The Supreme Court found this agreement a *per se* violation of the Sherman Act (498 U.S., at 49-50). Accord, *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) (holding horizontal customer allocation under § 1 *per se* illegal without requirement of anti-competitive intent); *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990) (when existence of horizontal customer allocation agreement is established, evidence of agreement's reasonableness is inadmissible); *United States v. Cooperative Theatres*, 845 F.2d 1367, 1373 (6th Cir. 1988) (holding customer allocation scheme *per se* illegal); *United States v. Capitol Serv.*, 756 F.2d 502 (7th Cir.) (a motion picture film "split" agreement with a right of first negotiation is a *per se* illegal allocation of markets), cert. denied, 474 U.S. 945 (1985).

⁵⁸In *Sanitation and Recycling v. New York City*, 107 F.3d 985, 999 (2nd Cir. 1997) the Second Circuit upheld New York City's Local Law 42 establishing the Trade Waste Commission and noted the role of trade associations with respect to the clauses in question:

"...Hence, even these carters not accused of wrongdoing are aware of the "evergreen" contracts and the other associational rules regarding property rights in their customers' locations. The association members—comprising the vast majority of carters—recognize the trade associations as the fora to resolve disputes regarding customers. It is that complicity which evinces a carter's intent to further the trade waste association's illegal purposes."

The Court's opinion suggests that the clauses in question were developed by the trade associations and adopted by the members. If there were such collective action, it would link all the carters who have adopted such clauses in an antitrust conspiracy designed to preserve the "property rights system" from competition by new entrants.

⁵⁵New York State Supreme Court Westchester County, Index No. 2672/95 ("Attorney Affidavit").

⁶⁰New York State Supreme Court, Westchester County, Index No. 590/94.

⁶¹In the opinion of Sub-Committee members, this clause may very well violate Section One of the Sherman Act. *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688, 690-91 (7th Cir. 1961) (agreement to refrain from advertising except by a sign on the pump is *per se* illegal); *Federal Prescription Serv. v. American Pharm. Ass'n*, 484 F. Supp. 1195, 1207 (D.D.C. 1980) (association ban on advertising by members is *per se* illegal), *aff'd in part and rev'd in part*, 663 F.2d 253 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982).

⁶²It has long been the law that an agreement not to compete for the customers of a competitor violates the Sherman Act. *Johnson v. Joseph Schlitz Brewing Co.*, 33 F. Supp. 176 (E.D. Tenn.1940), *aff'd*, 123 F.2d 1016 (6th Cir. 1941) (holding illegal an agreement among brewers not to compete for the exclusive draft accounts of each other). In *United States v. Cooperative Theatres of Ohio, Inc.*, 845 F.2d 1367 (6th Cir. 1988), the court held that an agreement not to actively solicit a competitor's customers was a *per se* violation even though the parties remained free to compete for new customers. In *Cooperative*, two movie theatre booking agents entered into an agreement whereby both promised not to compete for each other's clients. Specifically, although each agent could accept unsolicited business from the other's customers, neither could actively solicit each other's current customers. The agreement did not prevent the two from competing for new clients. Applying the *per se* standard, the district court found the agreement to be a horizontal agreement among competitors to allocate customers and, therefore, a *per se* violation of the antitrust laws. *Accord, Blackburn v. Sweeney*, 53 F.3d 825, 827 (7th Cir. 1995) (agreement not to advertise in specified territories *per se* illegal).

⁶³An agreement not to provide free service was an element of the criminal antitrust charge brought against waste haulers in *United States v. Aquafredda*, 834 F.2d 915 (11th Cir. 1987) *cert. denied* 485 U.S. 980 (1988). The Supreme Court observed that it was virtually self-evident that extending interest-free credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time. Thus, credit terms were characterized as an inseparable part of the price. An agreement to terminate the practice of giving credit is thus tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional *per se* rule against price fixing. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (*per curiam*). Certainly, giving free service for a period of time is so closely analogous to giving free credit that an agreement not to provide such free service falls within the *per se* proscriptions of the Sherman Act. The fact that the Stipulated Agreement does permit free service for the period commencing after the contract with the (1980) other party has expired mitigates the unlawful effect of this portion of the agreement but does not render it lawful.

⁶⁴Similar clauses have been held to be a *per se* price fixing arrangement. "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). It is a basic tenet of antitrust law that any conspiracy which has an impact on the price structure is illegal. As Mr. Justice Douglas stated in *Socony-Vacuum Oil*, *supra* at 221:

"... Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies..."

It is no defense to urge that the Stipulated Agreement is designed to forestall activity that is tortious under state law. It has long been the law that an agreement to refrain from tortious conduct under state law does not insulate such an agreement from the antitrust laws. In *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 at 468, 61 S. Ct. 703, 708, 85 L. Ed. 949 (1941), the Court wrote: "... Nor can the unlawful combination be justified upon the argument that systematic copying of dress designs is itself tortious, or should now be declared so by us. In the first place, whether or not given conduct is tortious is a question of state law, under our decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64. In the second place, even if copying were an acknowledged [**33] tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of Federal law..."

⁶⁵ *Hearings before the Sub-Committee on Trash Haulers*, Westchester County Bd. of Legislators, December 3, 1997; transcript at p. 44.

⁶⁶ *Hearings before the Sub-Committee on Trash Haulers*, Westchester County Bd. of Legislators, December 3, 1997, transcript at pp. 46-48.

⁶⁷ *Hearings before the Sub-Committee on Trash Haulers*, Westchester County Bd. of Legislators, December 3, 1997, transcript at pp. 50-51.

**CUSTOMER BILL OF RIGHTS
CONTRACT FOR SOLID WASTE SERVICES**

between _____ and _____
"Service Provider" "Customer"

Pursuant to Chapter 826-a of the Laws of Westchester County, the Customer shall be entitled to the following rights which cannot be waived:

1. This Service Contract shall not exceed (2) years in duration unless the Customer is a Municipality which has received a formal waiver of the contract term limit from the Commission.
2. A Service Contract which provides for automatic renewal shall be terminable by the Customer, without penalty, on thirty (30) days written notice to the Service Provider at any time during any renewal term of the Service Contract.
3. The Customer shall not be required to give the Service Provider more than (30) days notice of its intent to exercise its option to terminate or its option to renew an existing Service Contract prior to the expiration of such existing Service Contract.
4. All Service Contracts shall be terminable by the Customer, without penalty, during the final thirty (30) days of any regular Service Contract term or for the thirty (30) day period following any and all proposals made to a Customer by the Service Provider with whom the Customer currently contracts, where such proposal includes a proposal for a new Service Contract prior to the end of the regular term of the existing Service Contract.
5. Any notice of Service Contract termination from the Service Provider to the Customer shall be in writing, unless otherwise requested by the Customer.
6. Any notice of Service Contract termination from the Customer to the Service Provider may be made by the Customer or the Customer's Agent either: (i.) in writing by facsimile or regular mail; or (ii.) orally by a telephone call to the Service Provider's office.
7. In the event that the Service Provider's license or registration to provide solid waste services is suspended or revoked by the Westchester County Solid Waste Commission, the Service Provider shall notify the Customer, in writing, within (5) business days of the suspension or revocation.
8. A Customer who is notified, by the Service Provider or otherwise, of the suspension or revocation of its Service Provider's license or registration may, immediately and without penalty, terminate this Service Contract.
9. In the event of Service Contract termination prior to the end of any regular contract term, the Service Provider shall not require the Customer to pay liquidated damages.
10. The Customer shall not be required to inform the Service Provider of competitive offers which it may receive for the removal, collection or disposal of refuse and recyclable materials.
11. The Customer shall not be required to give the Service Provider an opportunity to match the terms of a competitive offer.
12. The Customer shall not be required to contract exclusively with the Service Provider named herein for the removal of the Customer's refuse and recyclable materials. However, a municipal Customer may request such an exclusivity provision in its Service Contracts pursuant to its procurement policy.
13. The Service Provider herein shall not discontinue service to the Customer unless at least fourteen (14) days advance written notice has been given to such Customer.
14. The Service Provider shall give the Customer no less than thirty (30) days advance written notice of proposed rate increases. Upon receipt of such written notice, a Customer may terminate its Service Contract, without penalty, by giving fourteen (14) days notice to the Service Provider.
15. The Service Provider shall promptly provide the Customer with any and all informational notices which the Westchester County Solid Waste Commission may develop or prescribe.

16. In the event that the Service Provider herein shall fail to comply with any of the requirements provided above in connection with this Contract for Solid Waste Services, the Customer shall be entitled to, immediately and without penalty, terminate this Service Contract. In the event that the Customer believes that such a failure to comply has occurred, the Customer is urged to consult with the Westchester County Solid Waste Commission in order to clarify the Customer's rights and obligations pursuant thereto.

17. All Customers and potential Customers in Westchester County shall have the option to be listed, without cost, in the CASH Registry, an internet accessible registry of the Westchester County Solid Waste Commission. The CASH Registry will inform Service Providers of the names and addresses of potential Customers who are seeking quotes for the collection of solid waste and recyclables within Westchester County. An interested Customer must notify the Westchester County Solid Waste Commission that it wishes to be listed in the CASH Registry. A Customer listing will automatically terminate after thirty (30) days, but any Customer may request that the Commission maintain the Customer's listing for additional thirty (30) day periods.

18. All Customers have the right and are encouraged to contact the Westchester County Solid Waste Commission to register a complaint against a Service Provider in the event that the Service Provider (a.) fails to provide the services as agreed under the Service Contract, (b.) fails to comply with the requirements outlined in this Customer Bill of Rights or (c.) engages in any of the following prohibited practices:

- (i.) Makes a false or misleading statement to the Customer or a prospective Customer;
- (ii.) Threatens or attempts to intimidate a Customer or a prospective Customer;
- (iii.) Imposes or attempts to impose liquidated damages upon a Customer for termination of a Service Contract;
- (iv.) Retaliates against a Customer or prospective Customer that has made a complaint to the Westchester County Solid Waste Commission or has exercised or attempted to exercise a right under Chapter 826-a of the Laws of Westchester County; or
- (v.) Discourages a Customer or prospective Customer, who has a question or inquiry concerning the Customer's or the prospective Customer's rights or obligations concerning solid waste, from contacting the Westchester County Solid Waste Commission.